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83709-1  
NO. 61127-5-I

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

FILED  
COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
2009 FEB 23 AM 11:03

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STATE OF WASHINGTON,

Respondent,

v.

TIMOTHY S. MARTIN,

Appellant.

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BRIEF OF RESPONDENT

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## **I. ISSUES**

The prosecutor cross examined the defendant about whether he reviewed the discovery before trial, and whether he heard the testimony of the state's witnesses before he testified himself. The United States Supreme Court has held this is permissible.

1. In this context does the State constitutional provisions guaranteeing a defendant the right to confront witnesses and testify on his own behalf provide the defendant greater protection than its federal counterparts?

2. Did the prosecutor commit misconduct warranting a new trial when she cross examined the defendant on his foreknowledge of witnesses' testimony in an attempt to test his credibility?

3. Should the Court exercise its supervisory power to find the kind of cross examination employed by the prosecutor here is impermissible, when defendants have been treated the same as any other witness since territorial times and this Court has specifically held the type of questions posed here are permissible?

## **II. STATEMENT OF THE CASE**

### **A. FACTS RELATING TO THE KIDNAPPING AND ROBBERY.**

On October 18, 2006 Jessica Sobania was on her way home from a church social when she stopped at the Smokey Point Rite Aid to look for medication for her young son. She was driving a 2001 Chrysler Town and Country mini van. She had her two children with her; A.S. and C.S. ages 3 and 5. She left the church social between 8:00 and 8:30 p.m. 12-4-07 RP 12, 14-15.

Ms. Sobania prepared to leave the Rite Aid parking lot by putting her children in their car seats. As she did so she was grabbed from behind and told to get in the van or her assailant would cut one of her children. Fearing for her children, Ms. Sobania complied and got into the driver's seat. She did not see any weapon, but she did see the man with something shiny in his hand. The man then climbed into the passenger seat. The man told her to drive, but did not direct her any particular place. 12-4-07 RP 19-22.

Ms. Sobania drove out of the parking lot and headed for I-5. She got onto the freeway headed southbound. She then exited the freeway at 116<sup>th</sup> street. While she was driving the man held onto Ms. Sobania's arm and demanded money. Ms. Sobania told him

any money she had was in her purse. He then grabbed her purse and rummaged through it. 12-4-07 RP 23-25.

After exiting the freeway the man directed her to the frontage road along the freeway. The man asked Ms. Sobania what her address was, and threatened he would find it and cut her children if she did not tell him. The man used a cell phone that was in Ms. Sobania's purse. He spoke into it as if he were giving her address to someone. Later it was determined that a call had never been placed on that phone. 12-4-07 RP 25-26; 12-6-07 RP 139.

Eventually the man directed Ms. Sobania onto a dark rural road. The man directed her to pull over so that he could take over driving. Ms. Sobania stopped in front of the Rubatino's home. When the man let go of Ms. Sobania to switch seats with her she jumped out of the van and ran to the fence calling for help. 12-4-07 RP 27-30.

Mr. and Mrs. Rubatino saw the van approach their home and stop in the driveway. They went outside to see what was going on. Ms. Sobania tried to scale the fence, calling to them, saying he was taking her babies. Ms. Sobiana is about the same height as the fence, and she had trouble getting over it. The man got out of the van and tried to pull her off the fence. Mrs. Rubatino yelled at him,

asking what he was doing. The man then got back in the van and took off with the children still in it. 12-4-07 RP 30-31, 69, 75-78.

After the man drove off the Rubatinos talked to Ms. Sobania. When Mrs. Rubatino heard Ms. Sobania did not know the man, she got in her car and tried to locate him. She was not able to find the van. The Rubatinos helped Ms. Sobania call the police. 12-4-07 RP 31-33, 80-81.

Police were dispatched to the Rubatino's home at 8:32 p.m. When Officer Hirotaka arrived he took Ms. Sobania to the Arlington Police Department. Once there Ms. Sobania worked with a sketch artist to draw a picture of the man who abducted her and her children. 12-4-07 RP 35, 87, 89-90, 95-100.

Police immediately began searching for the van and the children. Their search included putting out an Amber Alert. Richard Evans noticed the Amber Alert on the freeway when he was on his way to work about 4 a.m. He worked in Marysville at the Thomas Machine Shop and Foundry. When he arrived Mr. Evans noticed a van parked next to the foundry on some grass. Because the van matched the description of the vehicle in the Amber Alert he went inside and told his two co-workers about it. The men compared the license plate on the Amber Alert to the license plate on the van and

determined they matched. They then called the police. 12-4-07 RP 119, 121-124; 12-5-07 RP 7-11, 12-6-07 RP 112-119.

Police arrived immediately and retrieved A.S. and C.S. from the van. They then secured the van for investigation. During the course of their investigation police found a set of keys on the passenger seat. The keys did not belong to Ms. Sobania. They were later identified as belonging to the defendant, Timothy Martin. Police also collected a cell phone in the van. Ms. Sobania's purse was not in the van. 12-4-07 RP 50, 125, 142; 12-5-07 RP 37; 12-6-07 RP 70, 134-140.

FBI agents examined the van for evidence. As part of that process they swabbed areas of the van that they believed it was likely the suspect had touched. One of those areas was the steering wheel. Agents also collected the keys found on the passenger seat and the cell phone. A DNA test was performed on the swab from the steering wheel and on Ms. Sobania's keys that had been left in the van. The test revealed that DNA on those items belonged to the defendant. The likelihood that the DNA results from those two samples would appear in the population is 1 in 66 quadrillion. 12-4-07 RP 49, 12-6-07 RP 171-177; 12-7-07 RP 161, 169-175.

Police searched the area around the foundry where Ms. Sobania's van was found. About 240 feet from where the van had been left police found a bible with Ms. Sobania's maiden name in it. A little further on police located a woman's personal affects including a razor and lip gloss. About 320 feet from the van police located a sticker bush with a burrowed hole in it. Inside the hole was Ms. Sobania's purse, pictures of A.S. and C.S. and their immunization records, and Ms. Sobania's check book, and a black day timer. The day timer contained a Washington State identification for the defendant issued on October 17, 2006. Police also found a jacket in the burrow which was later identified as the defendant's. 12-6-07 RP 72-73, 199-211;12-7-07 RP 38-41, 44-45

On the morning of October 19, 2006 about 10:00 a.m. the defendant appeared at his ex-wife's home. Her home is about one and one-half miles from the foundry where Ms. Sobania's van and children were found. The defendant and Ms. Martin had been divorced for 10 years. Ms. Martin was raising their two children alone with no child support from the defendant. Prior to October 19 Ms. Martin had not seen the defendant for several years. The defendant was on Ms. Martin's back porch. He was soaking wet, wearing only a t-shirt and pants. The defendant acted like he did

not want to be seen. He asked to come in Ms. Martin's home to get warm. The defendant left when Ms. Martin refused to allow him in her home and threatened to call the police. 12-5-07 RP 51, 58-66, 68; 12-7-07 RP 45.

On that same date Officer Vandenberg of the Marysville Police Department responded to the Marysville Library on a report of a suspicious person hiding in the bushes. Once he arrived he found the defendant walking nearby. The defendant was wearing a mullet style wig that was put on in a haphazard fashion. He also wore blue jeans a dark blue sweatshirt and large framed glasses. The defendant acted nervous. When asked, the defendant initially denied he was wearing a wig. He later admitted it was a wig. He also admitted he was the person hiding in the bushes. He had no hard identification, but verbally identified himself. As the officer and the defendant parted the defendant called out that if the officer needed him he would be at 8<sup>th</sup> Avenue and 128<sup>th</sup> Street in Everett. 12-6-07 12-20, 36.

About 4 p.m. on October 19 the defendant showed up at Charles Walker's home in south Everett. Mr. Walker had known the defendant for a few months but had not seen him for awhile before that date. When the defendant arrived he was dirty and wet.

The defendant asked Mr. Walker for \$40 to pay the person who gave him a ride to Mr. Walker's home. Mr. Walker did not have the money so he gave the defendant a CD player to use as payment. When the defendant came back he told Mr. Walker "they are chasing me." The defendant went to the living room window and began peeking out the blinds frequently. He was nervous and fidgety. Eventually the defendant announced that he had to leave the county and asked Mr. Walker for a gun and to drive him to the county line. Mr. Walker refused to give the defendant his gun, but did drive him to the 128<sup>th</sup> street park and ride where he left the defendant after giving him \$5.00 for bus fare. 12-5-07 RP 76-88.

The defendant had been living with Gerrie Summers during October 2006. Ms. Summer's lived in an apartment at 12601 8<sup>th</sup> Avenue West in south Everett. During the time he stayed there he was in and out of her apartment. When he came to stay with Ms. Summers the defendant had a relaxed demeanor. The last time he came to her home he was agitated and paranoid. The defendant asked Ms. Summers to sand off some tattoos he had on his hands, but she refused. At one point after he returned the defendant spoke to Ms. Summers about a woman, some children, and a van. Ms. Summers responded that what the defendant was talking about

amounted to kidnapping. The defendant agreed that it was kidnapping. 12-6-07 RP 56-69, 105.

## **B. FACTS RELATING TO TRIAL.**

The defendant was tried on a second amended information charging three counts of first degree kidnapping and one count of second degree robbery. 1 CP 126-127. The state produced evidence at trial consistent with the facts outlined above. The defendant called several witnesses to testify for the defense. He then testified on his own behalf.

The defendant began his testimony by admitting he had convictions for theft, first degree robbery, forgery, possession of stolen property, and burglary. The defendant said he had been released from custody on October 12, 2006. Instead of reporting to his community corrections officer in Burien he went to Ms. Summer's home where he eventually stayed for a couple of weeks. He stated that on October 18 he decided to go to his ex-wife's home in Marysville to ask her for help. He hitchhiked to the Albertson's in south Marysville. He went to the library and got on the internet. He eventually left the library about 7:45 to 7:50 p.m. 12-11-07 RP 7-15.

He then worked his way north on foot, committing vehicle prowls. He ended up looking for shelter near a machine shop and foundry located off of Smokey Point Boulevard. While there he saw a van that he decided to prowl. He got in the van using the jiggler keys he found at Ms. Summer's house and grabbed the steering wheel. When he turned and saw the kids he was startled. He left the van, taking the purse that was on the seat. He surmised he dropped his jiggler keys in the van in his haste to leave. Because he did not want to be caught he hid in some bushes. He took off his coat and went through the purse. 12-11-07 RP 19-24

In the morning he went to his wife's house leaving his coat behind because it was "pretty much useless." He did not realize the planner with his identification had fallen out of his pocket when he was hiding in the bushes. When he got to his ex-wife's home she refused to help him. 12-11-07 RP 29-31.

As he worked his way back to Ms. Summer's home he first stopped at Bob's, a friend who lives in Marysville. He smoked some methamphetamine there. Because he thought he had warrant for failing to report to his community corrections officer, he borrowed a wig and a hat to avoid arrest. When he met the officer

at the library the defendant was surprised to learn that he did not have a warrant. 12-11-07 RP 32-36.

The defendant denied showing up at Mr. Walker's home cold and wet on October 19. He did admit that he hitched a ride from Bob's in Marysville to Mr. Walker's on that date. The defendant explained that he acted paranoid on the 19<sup>th</sup> because he was smoking methamphetamine with Mr. Walker. At his request Mr. Walker drove the defendant to the park and ride. From there the defendant went to Ms. Summers. While there he smoked methamphetamine with Ms. Summers, and told her that he had prowled a woman's van with children in it. 12-11-07 RP 36-37, 42-44.

The defendant explained that he was only "joking" when he asked Ms. Summers to sand off his tattoos. 12-11-07 RP 45-46

The defendant denied kidnapping Ms. Sobania. 12-11-07 RP 50.

During the course of his testimony defense counsel several times questioned whether his client had heard the testimony of state's witnesses. Upon receiving an affirmative response, counsel then posed questions regarding that testimony to which the defendant responded with his own version of what happened. The

defendant also testified that he knew some facts from hearing the testimony in court. 12-11-07 RP 28, 36-37, 43-44.

During cross examination the prosecutor engaged in a line of questioning regarding the defendant's foreknowledge of the testimony of state's witnesses. The prosecutor first questioned the defendant about whether he had the advantage of listening to all the testimony before testifying himself. She then questioned the defendant about whether he reviewed the witnesses' statements before coming to trial. She then asked about the length of time he had to reflect on what the witnesses were expected to say before trial. 12-11-07 RP 74-75.<sup>1</sup>

Defense counsel objected to this line of questioning. Outside the presence of the jury defense counsel argued the questions were impermissible because they were a comment on the defendant's right to confer with counsel. He also argued the questions impermissibly commented on the defendant's right to remain silent. The prosecutor argued the questions were in response to the defendant's statement on direct that there were things he knew from hearing the testimony at trial. The trial court

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<sup>1</sup> A copy of that portion of the transcript is attached to this brief as Appendix A.

overruled the objection, finding the questions did not comment on the defendant's constitutional rights. 12-11-07 RP 76-77.

In her closing arguments the prosecutor did not mention the defendant's preview of the witnesses' testimony in discovery or at trial before he testified. She did not argue that the defendant tailored his testimony to explain the State's evidence. Rather, she argued from the evidence and suggested the defendant's story was implausible. The jury convicted of all counts.

### **III. ARGUMENT**

#### **A. CROSS EXAMINATION DESIGNED TO TEST THE DEFENDANT'S CREDIBILITY BY ELICITING THE DEFENDANT'S FOREKNOWLEDGE OF WITNESSES' TESTIMONY DID NOT VIOLATE HIS CONFRONTATION RIGHTS.**

##### **1. The Court Has Not Decided That The State Confrontation Clause Provides Broader Protection Than Its Federal Counterpart In All Circumstances.**

The defendant challenges the prosecutor's line of questioning on the basis that it violated his confrontation rights. Specifically he challenges the cross examination on the basis that it violated his right to appear at trial, to present a defense, to testify on his own behalf, and to confront witnesses under Article I, § 22 of the Washington State Constitution. BOA at 1.

He recognizes the United States Supreme Court has held argument that a defendant has tailored his testimony, after hearing

the State's evidence, does not violate the Sixth Amendment right to be present at trial and confront his accusers. Portuondo v Agard, 529 U.S. 61, 120 S.Ct. 1119, 146 L.Ed.2d 47 (2000). He attempts to avoid application of this case by arguing Washington Constitution Art. 1, §22 provides greater protection than the Sixth Amendment, and therefore the line of questioning violated his state constitutional confrontation rights. In doing so he relies on the dissenting opinion in State v. Foster, 135 Wn.2d 441, 957 P.2d 712 (1998). For several reasons this Court should reject the defendant's arguments.

Foster considered whether RCW 9A.44.150 violated the defendant's state or federal confrontation rights. That statute permits, under limited circumstances, child witnesses to testify via one way closed circuit television rather than in the presence of the defendant. After conducting a Gunwall<sup>2</sup> analysis the plurality ruled "for purposes of determining whether RCW 9A.44.150 comports with the confrontation clause, we view the Defendant's state right to confrontation and his Sixth Amendment right to confrontation as being identical." Foster, 135 Wn.2d at 466. The concurring opinion differed from the majority only in that it believed an independent state analysis was required. It concluded however in

that context “face to face” confrontation under Washington’s constitution was no more protective than its federal counterpart. Foster, 135 Wn.2d at 474. After conducting its own Gunwall analysis the dissent concluded that the state constitution compelled actual physical face to face meeting between witness and accused. Foster, 135 Wn.2d at 494.

Whether the state constitution provides broader protection than its federal counterpart is dependant on the context to which it is applied. The Court revisited the confrontation question as it applied to RCW 9.94A.150 in State v. Smith, 148 Wn.2d 122, 131, 59 P.3d 74 (2002). There the court declared a child witness unavailable prior to admitting her hearsay testimony pursuant to RCW 9A.44.120 without first determining whether she could testify via closed circuit television. The Court refused to hold Washington’s constitution was more protective than the federal confrontation clause because “we have not yet decided whether Article I, section 22 provides greater protection than the federal provision in this situation and because Smith did not brief the issues in accordance with State v. Gunwall.” Smith 148 Wn.2d at 131. Because the issue raised here is completely different than

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<sup>2</sup> State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986).

that raised in Foster the Gunwall analyses in that case are not helpful to a determination that the prosecutor's questions violated any rights the defendant had under the state constitution.

The issue presented here relates to the defendant as a witness. Specifically the question raised is whether under either the federal or state constitutions, the defendant's confrontation rights are violated when the prosecutor is permitted to inquire about circumstances bearing on his credibility as a witness. Like Smith this is a different situation than presented in Foster. The defendant cites no authority that has held the state confrontation clause is more protective of the defendant's rights than the federal confrontation clause in the situation presented here. Nor does his Gunwall analysis address why in this situation Article I, § 22 provides any greater protection than the Sixth Amendment.

Other courts have rejected application of the Foster dissent's Gunwall analysis in dissimilar contexts as well. The defendant in Sandoval employed the same argument the defendant uses here to argue hearsay statements introduced pursuant to the excited utterance and medical diagnosis and treatment exceptions to the hearsay rule violated his state constitutional confrontation rights in State v. Sandoval, 137 Wn. App. 532, 538-539, 154 P.3d 271

(2007). The court rejected his argument in part because his Gunwall analysis was not persuasive. Sandoval conducted its own Gunwall analysis, and concluded the state constitution was not more protective than the federal constitution in the context of the statements at issue there. Sandoval, 137 Wn. App. at 539. Like the Sandoval court this Court should reject the Foster dissent's Gunwall analysis as authority for the defendant's position.

The defendant admits that that Foster addresses a different issue than he raises here. He admits that he was able to physically confront and cross examine the witnesses against him. The alleged error in the prosecutor's cross examination was in exploiting those rights by transforming them into "an automatic burden on his credibility" quoting the dissent in Portuondo, 529 U.S. at 76, 79 (Ginsberg, J. dissenting). That position has little weight in this case because the Portuondo dissent specifically approved the type of cross examination the defendant argues was error here.

Moreover, on cross-examination, a prosecutor would be free to challenge a defendant's overall credibility by pointing out that the defendant had the opportunity to tailor his testimony in general, even if the prosecutor could point to no facts suggesting that the defendant had actually engaged in tailoring.

Portuondo, 529 U.S. at 78.

**2. The State Constitution Does Not Afford A Criminal Defendant Broader Protection Than The Federal Constitution When the Defendant Exercises His Right To Testify.**

The defendant begins his Gunwall analysis by asserting that it is unnecessary because the Supreme Court has already decided that the state constitution provides greater protection than its federal counterpart, citing State v. Young, 123 Wn.2d 173, 867 P.2d 593 (1994). As demonstrated above, this assertion is not correct. Young also does not support this broad assertion, as it involved a search and seizure issue under the Fourth Amendment and Art. 1, §7.

Any question regarding whether the state constitution provides greater protection than the federal constitution in this context requires a separate Gunwall analysis. That analysis demonstrates testing the defendant's credibility as a witness on behalf of his defense is no more limited under Art. 1, §22 than under the Sixth Amendment.

The six factors that must be addressed before a court will hold that the state constitution provides greater protection than the federal constitution are: (1) the textual language of the state provision; (2) significant differences in the texts of the state and federal constitutions; (3) constitutional and common law history; (4)

preexisting state law: (5) structural differences between the state and federal constitution; and (6) whether matters of particular state or local concern are at issue. Gunwall, 106 Wn.2d at 61-62.

The defendant combines two different rights in his analysis; the right to confront witnesses and the right testify on his own behalf. These are distinct rights which in the context of this issue overlap. For that reason they will be discussed together.

**a. The Textual Language Of the Two Provisions.**

The first and second Gunwall factors involve the textual language of the two provisions. Art. 1, §22 guarantees the defendant the right “to meet the witnesses against him face to face.” The Sixth Amendment guarantees the right “to be confronted by the witnesses against him.” With respect to the first two Gunwall factors the defendant relies on the dissent’s analysis in Foster. That analysis focused on the “face to face” language in the state constitution. How the defendant was cross examined when he testified does not concern whether confrontation occurred face to face. Rather in this context the operative verbs are “meet” and “confront”. In this context they both mean “to see.” Since the meaning in this context is identical the textual differences do not justify independent review.

The Washington Constitution specifically provides the defendant has a right “to testify in his own behalf.” The Sixth Amendment provides the defendant the right “to have compulsory process for obtaining witnesses in his favor”. The defendant’s right to testify on his own behalf in part derives from the right to compulsory process. “Logically included in the accused’s right to call witnesses whose testimony is ‘material and favorable to his defense,’ is a right to testify himself, should he decide it is in his favor to do so.” Rock v. Arkansas, 483 U.S. 44, 52, 107 S.Ct. 2704, 2709, 97 L.Ed.2d 37 (1987). Thus, although the language between these two provisions is different, their meaning is the same; the defendant has the right to testify on his own behalf should he so choose.

Because the language used in both the confrontation and right to testify provisions means the same thing in the context of this case, the first two Gunwall factors favor finding the state and federal constitutional provisions are identical.

**b. Constitutional and Common Law History.**

The third factor, the constitutional and common law history, does not support the view that the state constitution is any broader than the federal constitution. Even in Foster all sides agreed that

the history of the confrontation provision yields no information at all other than to mention that it was lifted from the Oregon and Indiana constitutions. Foster, 135 Wn.2d at 460, 477, 487-488.

The defendant has cited no cases which provide any analysis supporting the conclusion that historically the Washington constitution has been interpreted to provide greater protection than the federal constitution in this context. Oregon's confrontation clause contains similar "face to face" language found in Washington's constitution. However, the defendant's citation to Moore and Campbell are inapposite. State v. Moore, 49 P.3d 785 (Ore. 2002), State v. Campbell, 705 P.2d 694 (Ore. 1985). Those two cases addressed the defendant's right to confrontation when the State sought to introduce hearsay without first demonstrating the witness was unavailable. Similarly, Stentz provides no clue to Washington's common law history regarding the extent to which a testifying criminal defendant may be cross-examined. State v. Stenz, 30 Wash. 134, 70 P.241 (1902), abrogated by, State v. Fire, 154 Wn.2d 152, 34 P.3d 1218 (2001). That case referenced the defendant's right to confront his accusers where one of the state's potential witnesses had also been called as a juror. Stentz, 30 Wash. at 41.

In Portuondo the Court addressed the history of the scope of cross examination of criminal defendants. Prior to 1864 defendants were not considered competent to testify, so tailoring arguments were unnecessary. In 1864 Maine became the first state to make defendants competent witnesses. While the majority of states that followed did not take steps to prevent the defendant tailoring his testimony, there was no evidence that they affirmatively forbade comments on the defendant's opportunity to do so. Portuondo, 529 U.S. at 65-67, 120 S.Ct. at 1123.

**c. Pre-existing State Law.**

In Gunwall the court considered territorial statutes enacted prior to statehood when determining whether Art. 1, § 7 provided greater protection than the Fourth Amendment in the context of obtaining a pen register on a person's telephone. Gunwall, 106 Wn.2d at 66. Pre-existing Washington law supports a finding Art. 1, § 22 is the same as the Sixth Amendment when considering the permissible scope of cross examining a testifying defendant.

Washington code of 1881, §1067<sup>3</sup> (currently enacted as RCW 10.52.040) is the statute which permitted criminal defendants to testify on their own behalf. It states in part:

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<sup>3</sup> A copy of the code section is attached to this brief as Appendix B.

and any person accused of any crime in this territory by indictment or otherwise, may in the examination or trial of the cause, offer himself or herself as a witness in his or her own behalf, and shall be allowed to testify as other witnesses in such case, and when such accused shall so testify he or she shall be subject to all the rules of law relating to cross examination of other witnesses...

Washington code of 1881, § 1067.

One of the rules relating to cross examination permits a party to inquire into facts which diminish the personal trustworthiness of the witness. State v. Robideau, 70 Wn.2d 994, 997, 425 P.2d 880 (1967), quoting, 5 Wigmore, Evidence § 1368 (3<sup>rd</sup> ed. 1040). Washington has a long history of permitting cross examination into matters which bear on the defendant's credibility.

In Peeples the Court found no constitutional error when the prosecutor cross examined the defendant charged with forgery regarding his passing forged paper on other occasions. State v. Peeples, 71 Wash. 451, 458, 129 P. 108 (1912). In Robideau the Court found no violation of the defendant's right to testify when the prosecutor was permitted to ask whether the defendant told police about the alibi he had just testified to. Robideau, 70 Wn. App. at 998.

When addressing the scope of cross examination of the defendant as it relates to the constitution the Supreme Court said

A defendant in a cause has no special privileges when he offers himself as a witness on his own behalf. His credit as a witness may be tested and his testimony impeached in the same manner and to the same extent as that of any other witness. While under the Constitution he cannot be compelled to give evidence against himself, it is not to violate the rule to ask him concerning his connection with other offenses similar to that for which he is on trial.

State v. Hollister, 157 Wash. 4, 7, 288 P. 249, 250 (1930).

The territorial law as it existed before statehood, and as it has been interpreted since then, shows that Washington provides no greater protection than the federal constitution to a testifying criminal defendant.

**d. The Structural Differences Between the State and Federal Constitution and Whether Matters of Particular State or Local Concern are at Issue.**

The fifth Gunwall factor only speaks generally to whether the state constitution is more protective than the federal constitution. However the Supreme Court has recognized that it does not particularly shed light on specific issues. State v. Ortiz, 119 Wn.2d 294, 303, 831 P.2d 1060 (1992).

The sixth factor, likewise neither supports nor does not support the conclusion that Washington's constitution is more

protective here than the federal constitution. While Washington may be concerned with ensuring criminal defendants be permitted to testify if they so choose, that is not necessarily a matter solely of local concern. Moreover the scope of permissible cross examination of a criminal defendant is not particularly a matter of local concern. These last two factors are at best a wash.

### **3. The Defendant Was Subject To Cross Examination Designed To Test His Credibility.**

The defendant notes that this Court previously held a tailoring argument violated the Sixth Amendment in State v. Johnson, 80 Wn. App. 337, 908 P.2d 900, review denied, 129 Wn.2d 1016, 917 P.2d 565 (1996). He acknowledges that this Court recognized the holding was overruled in State v. Miller, 110 Wn. App. 283, 40 P.3d 692, review denied, 147 Wn.2d 1011, 56 P.3d 565 (2002). He then asks this Court to adopt it's reasoning in Johnson and apply it to determine the questions were an improper infringement on his rights under Art. 1, § 22. The Court should not do this for three reasons.

First, as demonstrated above, Washington does not provide a testifying defendant any greater protection than the federal constitution. Second, even if the court were to determine that an

independent analysis was warranted, that does not necessarily lead to the conclusion that the state constitution prohibits this type of questioning. In Foster the concurrence/dissent agreed that the issue should be considered under the Washington constitution not the federal constitution. However, even under Washington law the statute at issue there was not unconstitutional. Because there is a long history of treating testifying defendant's the same as any other witness, an independent analysis under the state constitution should yield no different result than under the Sixth Amendment.

Third, this Court has already held the type of questions posed here did not violate the defendant's constitutional rights in State v. Smith, 82 Wn. App. 327, 917 P.2d 1008 (1996), review denied, 130 Wn.2d 1023, 930 P.2d 1231 (1997), overruling recognized, Miller, Id.. There during cross examination the prosecutor inquired into whether the defendant had a preview of the evidence and testimony before he took the stand. The prosecutor followed up by asking

"Isn't it fair to say that after you looked at all the photographs in the case and you had a chance to read the discovery and see what people were going to say and hear what they had to testify to, it was only then that you crafted your story about what happened, how it would fit with the pictures and the evidence that you heard?"

Smith, 82 Wn. App. at 334.

This Court distinguished these questions from the argument in Johnson, stating the holding in that case did not prevent the State from arguing that a defendant has tailored his testimony to the states evidence. "The constitutional right is to be present at trial and confront witnesses. It is not a right to be insulated from suspicion of manufacturing an exculpatory story consistent with the available facts." Smith, 82 Wn. App. at 335.

#### **4. Any Error Was Harmless.**

Even if the prosecutor's cross examination was improper, any error was harmless. Constitutional error is harmless if the reviewing court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error. State v. Watt, 160 Wn.2d 626, 635, 160 P.3d 640 (2007).

The challenged cross examination was relatively brief and began when the defendant testified that he relied on prior testimony to state what time he was at the foundry and entered the van. 12-11-07 RP 74-75, 78-79, 82. The cross examination only established the defendant had known what witnesses were going to say and certain critical facts well before trial commenced. The

prosecutor left it for the jury to draw its own conclusions, and did not argue in closing the defendant necessarily crafted his testimony to explain away the evidence.

There was substantial evidence that proved the defendant was the kidnapper and robber. The defendant's DNA was found on the steering wheel and Ms. Sobania's keys. A person's DNA left by handling an item is more likely to be found when the person has touched the item for a significant period of time. It is not usually found when a person has momentarily touched the item. 12-7-07 RP 162. Finding the defendant's DNA on the steering wheel and keys to the van was consistent with the defendant driving the van from the Rubatino's house to the foundry, and inconsistent with the defendant's explanation that he momentarily touched those items when he entered the van to prowling it. 12-11-07 RP 22.

By the defendant's own testimony he stole Ms. Sobania's purse out of her van. 12-11-07 RP 24. This is consistent with her testimony that her assailant was looking for money. 12-4-07 RP 24. Ms. Sobania did provide details of her assailant's appearance which was used to prepare a sketch. The sketch artist added some hair to a copy of that sketch. When hair was added the picture looked similar to a picture of the defendant taken shortly before the

crime was committed. 12-4-07 RP 35-36, 100, 111-112, Ex. 28, 36, 66. (copies of these exhibits are attached as Appendix C).

The defendant tried to change his appearance after the kidnapping, wearing a wig and glasses. 12-6-07 RP 15-20. He was anxious and fidgety, concerned that people were out to get him, even after he learned there was no warrant for his arrest. 12-5-07 RP 82-85; 12-6-07 RP 60. Finally he admitted to Ms. Summer's that what he had done amounted to kidnapping. 12-6-07 RP 62.

The defendant argues the case was not overwhelming, pointing to evidence the defendant was at the Marysville library around 7:00 to 7:25 p.m. and evidence the crime occurred some 8 miles away about one hour later. 12-4-07 RP 89-92; 12-10-07 RP 57 (morning session); 12-11-07 RP 147. He suggests the State's theory does not explain how he walked that distance in time to commit the crime. The State's theory is not undermined by this evidence because it is dependant on the defendant's claim he was walking. The defendant himself established that he was capable of obtaining rides when he wanted them, first hitchhiking to Marysville, and then hitchhiking back to Everett the next day. 12-11-07 RP 11, 42. Although there is no direct evidence how the defendant got to Smokey Point, in light of the defendant's demonstrated mobility, the

distance between the library and the crime scene is inconsequential.

The defendant also attacks Ms. Summer's credibility while failing to acknowledge evidence which considerably undermined his own credibility. The defendant had at least five prior convictions in the past 10 years for crimes of dishonesty. 12-11-07 RP 7. The foundation of his defense was that he was engaged in other dishonest acts, namely vehicle prowling, and happened to come across a van which happened to have been stolen with two young children in it.

The remainder of his testimony was implausible. Although the young children's presence startled him to the point that he dropped his burglary keys, he had the presence of mind to take the purse when he left. He did not want to be caught so he hid in nearby bushes. But then he was so careless that he left his day timer with his identification in it along with the purse and its contents, an act which is inconsistent with avoiding detection. His explanation that he did not realize the day timer with his identification fell out of his pocket made no sense in light of his testimony that he intentionally left his coat in the bushes because it was "pretty much useless." He did other things that were consistent

with trying to avoid being caught, but tried to shrug them off with innocent explanations. He wore a silly wig and glasses the next day because he like Halloween. He asked Ms. Summers to sand off his tattoos, but he was only joking. 12-11-07 RP 24-25, 29-30, 34, 45.

The defendant's explanations were also not consistent with his actions. He had not seen his wife for a long time; he decided to make his way to Marysville to seek her assistance because he had no money and no place to stay. However he had a place to stay at the time, living with Ms. Summers. There was no evidence she intended to kick him out of her home. The defendant did not think he should show up empty handed, so he prowled cars to get money to give her, even though he had never given his wife any child support. 12-11-07 RP 8-11,18-19.

The asserted weaknesses in the State's case were inconsequential. The defendant's explanation for his actions made little if any sense. The defendant admitted that some of his testimony was based on the evidence provided by the State's witnesses. Given the strength of the State's case, and the implausibility of the defendant's explanation for that evidence, it is

not likely that the jury verdict was affected by the prosecutor's questions in cross examination.

**B. THE COURT SHOULD DECLINE THE REQUEST TO EXERCISE ITS SUPERVISORY POWERS TO LIMIT THE SCOPE OF CROSS EXAMINATION FOR TESTIFYING CRIMINAL DEFENDANTS.**

For over one hundred years Washington has treated testifying criminal defendants the same as any other witness at trial. For at least thirteen years this Court has held the kind of cross examination that was conducted here is proper. Now the defendant invites the Court to exercise its supervisory power to change this established precedent which favors finding the truth by subjecting the defendant to the same rules of cross examinations as other witnesses. He then asks the Court to apply this new rule to his case and overturn his conviction. This Court should decline to do either.

In support of his argument the defendant cites authorities from New Jersey and Massachusetts. New Jersey broke with thirty years of precedent when it decided that tailoring arguments were impermissible in State v. Daniels, 861 A.2d 808 (N.J. 2004). Daniels concluded that tailoring arguments undermine the defendant's right to a fair trial, but did not explain why, except to enumerate the various rights a defendant had at trial. Daniels, 861

A.2d at 819. In any event, the Court later determined the argument did not substantially impair the truth finding function sufficient to make the new rule announced in Daniels retroactive for all cases. State v. Feal, 944 A.2d 599, 609 (N.J 2008).

Daniels considered the decisions of other courts in concluding the type of argument was improper. One such case was Commonwealth v. Person, 508 N.E.2d 88 (Mass. 1987). Persons, and Beauchamp, cited by the defendant here, address a different kind of argument. Commonwealth v. Beauchamp, 677 N.E.2d 1135 (Mass. 1997). In each case the prosecutor's tailoring argument was combined with an argument that clearly commented on the defendant's exercise of a constitutional right to obtain counsel and remain silent. Persons, 508 N.E.2d at 91, Beauchamp, 677 N.E.2d at 1140. Beauchamp stated that a prosecutor may challenge the defendant's credibility by arguing his testimony was fabricated, but may not do so by pointing to his exercise of constitutional rights as evidence of fabrication. Beauchamp, 677 N.E.2d at 1140. In Gaudette, also cited by the defendant, the Court found no error in arguing the defendant fabricated his defense because there was evidence in the record to

support that argument. Commonwealth v. Gaudette, 808 N.E.2d 798, 803 (Mass. 2004).

Like Massachusetts, Washington distinguishes between cross examination and argument that focuses on the credibility of the defendant and witnesses and those that are a true comment on the defendant's exercise of his constitutional rights. While the former is permissible, the latter is not. Miller, 110 Wn. App. at 284, State v. Gregory, 158 Wn.2d 759, 808, 147 P.3d 1201 (2006). Unlike Massachusetts and Washington, New Jersey's per se rule enunciated in Daniels makes no such distinction. Nor does it give any reason for not doing so. Where Washington has already made this distinction, this Court should not follow in New Jersey's footsteps by adopting a rigid overly exclusive rule.

In Portuondo the Court made clear it only decided whether argument the defendant tailored his testimony to the evidence was constitutional. It left to the state courts the question as to whether it was always desirable as a matter of sound trial practice. Portuondo, 529 U.S. at 73, n. 4. The defendant suggests that this is an invitation to state courts to do just that. Such evaluation is unnecessary in Washington. It has already been done when the Courts in this state have found cross examination and argument on

the subject is permissible when it focuses on the defendant's credibility.

Even if this Court views the defendant's position as the better approach, it should not overturn the defendant's conviction. The Court does have the inherent power to supervise court procedures. State v. Fields, 85 Wn.2d 126, 129, 530 P.2d 284 (1975). Thus where the court determined a jury instruction did not relieve the State of its burden of proof, it was still able to exercise its supervisory power to instruct lower courts to refrain from using the instruction in future cases. State v. Bennett, 161 Wn.2d 303, 165 P.3d 1241 (2007). The Court did so because it was preferable to have a uniformity on the issue, and another instruction in use was simple and had been accepted by the courts. Bennett, 161 Wn.2d at 317.

None of the cases cited by the defendant regarding the Court's inherent supervisory authority permit or even suggest that it is proper for a court in exercising its supervisory authority to depart from an accepted practice, and use that departure as a basis to reverse a criminal conviction. In Bennett, even though the Court mandated lower courts use a reasonable doubt instruction that was different from the one used there, it did not apply that rule

retroactively to reverse the defendant's conviction. Nor should the court do so here, even if it agrees with the defendant that the line of cross examination used by the prosecutor was not a "sound trial practice." To do so would be enormously unfair in light of prior authority which has held much more pointed tailoring remarks do not violate any of the defendant's constitutional rights.

**C. THE PROSECUTOR DID NOT COMMIT MISCONDUCT.**

The defendant argues the prosecutor's cross examination was not permitted because it violated his state constitutional right to be present, confront witnesses against him, and testify on his own behalf. However, an examination of those provisions in Art 1, § 22 and their Sixth Amendment counterparts show that the state constitution does not provide greater protection. Since it is not more protective of the defendant's rights, the Court's decision in Portuondo should control. Additionally, even aside from the United States Supreme Court ruling, this Court has already decided the type of questions asked here were not improper.

As noted RCW 10.52.040 allows a defendant to be competent to testify as a witness on his own behalf with the proviso that he is to be treated the same as any other witness on cross examination. The permissible scope of cross examination includes

matters raised on direct examination, and matters affecting the credibility of the witness. State v. Lord, 117 Wn.2d 829, 870, 822 P.2d 177 (1991), cert. denied, 506 U.S. 856, 113 S.Ct. 164, 121 L.Ed.2d 112 (1992). The prosecutor's cross examination here was within the scope of both of those matters.

Three times during his direct examination the defendant acknowledged that he had heard the testimony of the state's witnesses. Twice he went on to explain and refute that testimony. The third time he specifically stated he relied on the testimony of state's witnesses to place his presence at the van when it was parked by the foundry at a particular time. Particularly under these circumstances it was permissible for the prosecutor to inquire into the extent of the defendant's knowledge of the witnesses' testimony before testifying and the degree to which it impacted what he had to say. The purpose of the inquiry was clearly to test his credibility. It was specifically limited to questions and answers he gave on direct examination. It was not in any way a comment on the defendant's exercise of his right to testify, be present at trial, or confront the witnesses.

Finally, a defendant is not entitled to reversal of his conviction on the basis of prosecutorial misconduct when the

remarks of the prosecutor, even if misconduct, were invited or provoked by the defense, and are a pertinent reply. State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129, 115 S.Ct. 2004, 131 L.Ed.2d 1005 (1995). Some of the direct examination was designed to respond to specific statements state's witnesses had made by referencing the testimony of those witnesses. On his own the defendant stated he was relying on the testimony of state's witnesses to respond to questions posed by his attorney. The prosecutor's questions followed up this testimony. Because it was in response to questions and answers given in direct examination, even if error, the prosecutor's cross examination cannot be grounds for reversal.

#### **IV. CONCLUSION**

For the forgoing reasons the State requests that the Court affirm the defendant's convictions.

Respectfully submitted on February 20, 2009.

JANICE E. ELLIS  
Snohomish County Prosecuting Attorney

By: Kathleen Webber  
KATHLEEN WEBBER WSBA #16040  
Deputy Prosecuting Attorney  
Attorney for Respondent

1 A. I already testified that when I climbed in the car I  
2 would take it away and warm up in it, yes, that was  
3 not my intention when I first climbed in.

4 Q. What was not your intention when you first climbed in?

5 A. When I first climbed in, I saw the purse, and jumped  
6 in and then tried to jiggle it, if I got it started, I  
7 would have pulled away and got warmed up, yes.

8 Q. Now, can you tell me again about what time it is you  
9 think this happened, about what time do you think you  
10 got into the van?

11 A. I would say my estimate, 11:30, 12:00, 12:30. Like I  
12 said, I didn't have a watch. I don't know for sure.  
13 I heard plenty of people working. I'm saying this  
14 time, because of prior testimony, that I heard, said  
15 that the shop was closed at 1:00 a.m., so it was  
16 before 1:00 a.m.

17 Q. And you've had the advantage of hearing all the  
18 testimony before you testified today, correct?

19 A. Obviously I have been sitting in that seat the whole  
20 time, yes.

21 Q. And you've also had the advantage of knowing what  
22 people were going to say ahead of time, wouldn't you  
23 agree with me?

24 A. No, I didn't know what anybody was going to say ahead  
25 of time.

1 Q. You didn't get to read the police reports?

2 A. I got to read the police reports.

3 Q. And you didn't get to read witness statements?

4 A. I read witness statements, yes.

5 Q. And you weren't allowed to bring those reports and  
6 statements with you to court?

7 A. I read everything involved, yes.

8 Q. And you've had what, a little over a year to  
9 concentrate on what people were going to say, didn't  
10 you?

11 MR. KROM: I object, and ask --

12 THE COURT: Overruled.

13 MR. KROM: -- to be heard outside the presence of  
14 the jury.

15 THE COURT: All right. Ladies and gentlemen, you  
16 may be excused into the jury room.

17

18

19

20

(The jury excused during  
the following  
proceedings.)

21

22

23

24

MR. KROM: Well, your Honor, I object, it seems to  
me that the prosecution is making an impermissible  
comment on the defendant's exercise of his  
Constitutional Rights.

25

He has a right by the constitution to be

the following  
proceedings.)

THE COURT: Counsel?

MR. KROM: Your Honor, I just want to clarify something. I don't know if Ms. Blume intends to use these, but she's given me a series of booking photographs and I don't know if she intends to get into these or not.

MS. BLUME: Probably not, but I got three copies, and so I figured I might as well give Mr. Krom a copy, just in case that I did.

MR. KROM: Well, if she decides she wants to, I want to be heard outside the presence of the jury because I think they are prejudicial and she should not be able to use them.

MS. BLUME: Okay.

THE COURT: All right.

You may bring in the jury.

(The jury was present  
during the following  
proceedings.)

THE COURT: You may proceed.

BY MS. BLUME:

Q. Mr. Martin, when we left on break, we have been talking about whether or not you had a year to think

1           about your testimony.   Do you remember that?

2       A.   I have been in custody for 13 months.

3       Q.   That wasn't my question.   My question is, you've  
4           known this was coming up for a year, correct?

5       A.   I thought of nothing about this, yes.   I was ready to  
6           go to trial a year ago.   I am not the one who made it  
7           last this long.

8       Q.   From now on you need to listen to my questions and  
9           answer my questions, okay.

10           THE COURT:   Or I'm going to start barking at you.

11           THE WITNESS:   I'm sorry.

12       BY MS. BLUME:

13       Q.   So in the pendency of this trial, you've had access of  
14           what the evidence was?

15       A.   I've read the police reports, I've read your  
16           discovery, yes.

17       Q.   And you've heard all the testimony so far?

18       A.   So far, yes.

19       Q.   And so you knew all that before you testified?

20       A.   Yes.

21       Q.   And so you knew exactly where your DNA had been found  
22           in the car?

23           MR. KROM:   I'm going to object to this, your Honor.  
24           This is highly inappropriate.

25           THE COURT:   Overruled.

(The jury was present  
during the following  
proceedings.)

THE COURT: You may be seated.

BY MS. BLUME:

Q. Mr. Martin, you've known since April that your DNA was on the keys?

A. Yes.

Q. And you've known since August that your DNA was on the steering wheel, isn't that true?

A. Yes.

Q. Now, I want to get back to you getting into the van.

When you came up to the van, it was all steamy, wasn't it?

A. No.

Q. It wasn't all steamy, was not all steamy?

A. The windows were tinted.

Q. The question is about steam, were the windows all steamy?

A. I didn't notice any steam, I wasn't paying attention, I wasn't looking for steam. It was the first car in the parking lot of vehicles that I was going to look into.

Q. But that van wasn't in a parking lot?

A. It was close to a parking lot, ma'am.

# CODE OF WASHINGTON

CONTAINING ALL

## ACTS OF A GENERAL NATURE

REVISED AND AMENDED BY THE LEGISLATIVE ASSEMBLY OF THE TERRITORY OF WASHINGTON, DURING THE EIGHTH BIENNIAL SESSION, AND THE EXTRA SESSION, ENDING DECEMBER 7, 1881; THE CONSTITUTION OF THE UNITED STATES AND AMENDMENTS THERE TO; THE ACTS OF CONGRESS APPLICABLE TO THE TERRITORY OF WASHINGTON; AND THE NATURALIZATION LAWS.

*Published by Authority.*

OLYMPIA:

C. B. BAGLEY, PUBLIC PRINTER.

1881.

proved by the court or judge making the return with the papers in the case.

The court must order the amount in which the defendant is to be held to bail, and the clerk must return the warrant to the judge of the county. If no order fixing the amount of bail is made, the judge of the county must thereon indorse the amount of bail. If no such judge in the county the clerk

indorsement are returnable after the close of the term of bail to be required of the defendant, the clerk must inform the defendant that he acts under the warrant and also show the warrant if required. If the intention to arrest the defendant, the clerk or officer may use all necessary means to

prevent the person from escaping or being rescued, the person from whom bail was taken, or was rescued, may immediately pursue

and within any place in the territory, or rescued, the person pursuing has the same rights as given in cases of arrest.

Criminal proceedings may be taken in any court of record.

Authorized to execute a warrant in a criminal case and justify and approve the bail; he may return the bail as to its sufficiency.

Any bail taken by any peace officer must be certified to the court to which the defendant is taken, and thereupon record the recognizance in the minutes of the court, it has the same effect as if taken

in the place of giving bail, deposit which he is held to answer, the sum of money and upon delivering to the sheriff the defendant is discharged from custody.

The court may excuse the defendant's neglect to appear on any other occasion when his presence in court is required according to the condition of his recognizance. The defendant may be entered upon its minutes as being in default, if money deposited as bail, as the case may

be after the finding of an indictment for a crime. The defendant shall be served with a copy thereof by the clerk at least twenty-four hours before trial, and the defendant, by himself or counsel, have a list of the names of the witnesses to be called to him at least twenty-four hours before trial. The court may summon such witnesses as are necessary to the case of the county.

The court may order for an offense for which he may be held to bail, if he be under recognizance, or in custody, that he or his attorney shall be furnished with

a copy of the indictment, and of all endorsements thereof without paying any fees therefor.

Sec. 1040. When a defendant is prosecuted in a criminal action for a misdemeanor, for which the person injured by the act constituting the offense has a remedy by a civil action, the offense may be compromised as provided in the next section, except when it was committed:

1. By or upon an officer while in the execution of the duties of his office.
2. Riotously; or,
3. With an intent to commit a felony.

Sec. 1041. If the party injured in such a case appear before the court to which the papers on a preliminary examination are required to be returned, at any time before trial, on an indictment for the offense, or the trial of an appeal in the district court, and acknowledge in writing that he has received satisfaction for the injury, the court may, in its discretion, on payment of the costs incurred, order all proceedings to be stayed upon the prosecution, and the defendant to be discharged therefrom. But in that case the reasons for the order must be set forth therein, and entered upon the minutes.

Sec. 1042. The order authorized by the last section is a bar to another prosecution for the same offense.

Sec. 1043. No offense can be compromised, nor can any proceedings for the prosecution or punishment thereof, upon a compromise, be stayed, except as provided in this chapter.

## CHAPTER LXXXIV.

### OF THE DOCKET.

#### SECTION

1044. The clerk shall enumerate and classify the indictments.

Sec. 1044. The clerk shall, in preparing the docket of criminal cases, enumerate the indictments pending, to be tried at the term according to the date of their filing, and specifying opposite to the title of each action, whether it be for a felony or misdemeanor, and whether the defendant be in custody or on bail, and shall, in like manner, enter therein all indictments found during the term, and on which issues of fact are joined, all cases sent to the court on change of venue, and all cases sent to the court by a magistrate on appeal or otherwise.

## CHAPTER LXXXV.

### OF THE ARRAIGNMENT OF THE DEFENDANT AND OF WITNESSES AND EVIDENCE.

#### SECTION

1045. Motion to set aside indictment, demurrer or plea.

1046. Grounds of motion to set aside.

1047. Motion not allowed in certain cases.

1048. If motion denied.

1049. If case re-submitted, defendant remain in custody.

1050. An order to set aside, shall be no bar to future prosecution.

1051. Grounds of demurrer.

1052. If demurrer is sustained, when defendant must be discharged.

1053. If demurrer overruled, defendant may plead.

1054. If defendant fails to plead, judgment may be rendered on demurrer.

1055. Pleas to the indictment.

1056. Forms of pleas.

1057. Plea of guilty must be by defendant personally.

#### SECTION

1057. Plea of guilty may be withdrawn any time before judgment.

1058. Plea of not guilty, denial of every material allegation.

1059. A conviction or acquittal upon a verdict, shall bar another prosecution.

1060. Judgment on demurrer, shall not bar another prosecution.

1061. If defendant refuse to answer plea of not guilty.

1062. If defendant plead guilty, procedure.

1063. When court may assign counsel.

1064. Defendant shall answer as to his true name.

1065. If indicted by improper name his true name shall be substituted.

1066. For misdemeanor defendant may appear by counsel.

1067. Attendance, how procured.

varrant issues. competent in

## SECTION

1055. Confession of defendant: when may be used.  
1057. Rule in civil actions, shall govern.

At the arraignment, the defendant may move to set aside the indictment, or he may demur or plead to it, and is entitled to set aside the indictment can be made by the defendant on the following grounds, and must be sustained by the court, "a true bill," and the endorsement signed by the grand jury as prescribed by this code.

All the witnesses examined before the grand jury shall be presented and marked "filed" as prescribed by law.

Other than the grand jurors, was present before the grand jury, a question was taken upon the finding of the indictment, other than the grand jurors, was present before the grand jury, the investigation of the charge, except as provided by law.

When the grand jurors were not selected, drawn, summoned, empaneled by law.

On the motion to set aside the indictment, the motion of the preceding section is not allowed to be held to answer before indictment.

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## Secs. 1055-1067]

SEC. 1055. The plea may be entered on the record, substantially, in the following form:

1. A plea of guilty. "The defendant pleads that he is guilty of the offense charged in the indictment."

2. A plea of not guilty. "The defendant pleads that he is not guilty of the offense charged in the indictment."

3. A plea of former conviction or acquittal. "The defendant pleads that he has formerly been convicted or acquitted (as the case may be,) of the offense charged in the indictment, by the judgment of the court of \_\_\_\_\_ (naming it,) rendered on the \_\_\_\_\_ day of \_\_\_\_\_ A. D., 18—, (naming the time.)"

SEC. 1056. The plea of guilty can only be put in by the defendant himself in open court.

SEC. 1057. At any time before judgment, the court may permit the plea of guilty to be withdrawn, and other plea or pleas substituted.

SEC. 1058. The plea of not guilty is a denial of every material allegation in the indictment; and all matters of fact may be given in evidence under it, except a former conviction or acquittal.

SEC. 1059. A conviction or acquittal by a judgment upon a verdict shall bar another prosecution for the same offense, notwithstanding a defect in form or substance in the indictment on which the conviction or acquittal took place.

SEC. 1060. The judgment for the defendant on a demurrer, except where it is otherwise provided, or for an objection to its form or substance taken on the trial, or for variance between the indictment and the proof, shall not bar another prosecution for the same offense.

SEC. 1061. If the defendant fail or refuse to answer the indictment by demurrer or plea, a plea of not guilty must be entered by the court.

SEC. 1062. If, on the arraignment of any person, he shall plead guilty, if the offense charged be not murder, the court shall, in their discretion, hear testimony, and determine the amount and kind of punishment to be inflicted; but if the defendant plead guilty to a charge of murder, a jury shall be empaneled to hear testimony, and determine the degree of murder and the punishment therefor.

SEC. 1063. If the defendant appear without counsel, he shall be informed by the court that it is his right to have counsel before being arraigned, and he shall be asked if he desire the aid of counsel, and if it appear that he is unable to employ counsel by reason of poverty, counsel shall be assigned to him by the court.

SEC. 1064. When the defendant is arraigned, he shall be interrogated, if the name by which he is indicted be not his true name; he shall then declare his true name, or be proceeded against by the name in the indictment.

SEC. 1065. If he allege that another name is his true name, it must be entered in the minutes of the court, and the subsequent proceedings on the indictment may be had against him by that name, referring also, to the name by which he is indicted.

SEC. 1066. If the indictment be [for] a misdemeanor, punishable by fine only, the defendant may appear upon arraignment by counsel.

SEC. 1067. Witnesses may be compelled to attend and testify before the grand jury; and witnesses on behalf of the territory, or of the defend-





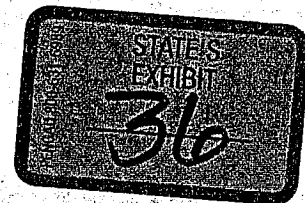
APPENDIX C

580



EVIDENCE  
POLICE DEPARTMENT  
ARLINGTON POLICE DEPARTMENT

3146



**ARLINGTON POLICE DEPARTMENT  
EVIDENCE**

CASE# 06-3525 ITEM # PB 24

OFFICER BRENNER DATE 12 / 13 / 06

DESCRIPTION Comp. Sketch

TYPE OF CASE KIDNAP 10



PB

Case No.: 06-1-03291-2  
Exhibit No. 36 Marked for Identification  
Deft's Admitted Not Offered Rejected  
Janie McColley, Deputy Clerk

88.

PB